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Supreme Court, U.S.
FILED
AUG 28 2003
OFFICE OF THE CLERK

No. 03-160

In The
Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, D/B/A RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

vs.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMERICAN HEALTH CARE ASSOCIATION, AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2(b) of this Court, the American Health Care Association (AHCA), American Association of Homes and Services for the Aging (AAHSA), and National Association of Independent Insurers (NAII) move for leave to appear as *amici curiae* and file the accompanying *amicus curiae* brief in support of petitioners. Petitioners have consented to the filing of this brief, but respondent has refused to give consent.[1]

As explained in more detail in the statement of interest in the accompanying brief, AHCA is a private, non-profit federation of affiliated state associations representing approximately two-thirds of this nation's nursing homes. AAHSA is also a non-profit membership association, with 40 affiliated state associations that represent more than 5000 non-profit facilities and organizations providing housing, health care and other services to aging and disabled individuals. NAII is a non-profit property and casualty trade association, representing more than 725 member companies.

AHCA, AAHSA and NAII can offer this Court a unique perspective on the nursing home profession, the nation's critical and growing need for the health care services it provides, and the serious threat to these services posed by excessive punitive damages awards – in particular punitive damages awards that have no relation to (and, in this case, actually exceed) a defendant's net

[1] Petitioners' letter of consent to the filing of this brief has been filed with the Clerk of the Court.

worth. The Court has not yet addressed the necessity of considering a defendant's net worth in determining whether a punitive damages award is excessive and in violation of the Due Process Clause of the Fourteenth Amendment. AHCA, AAHSA and NAII respectfully urge the Court to address this question because, as explained more fully in the accompanying brief, excessive punitive damages awards adversely impact the entire nursing home profession, not just the individual nursing home involved.

Accordingly, AHCA, AAHSA and NAII move for leave to appear as *amici curiae* and file the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The American Health Care Association (AHCA), American Association of Homes and Services for the Aging (AAHSA), and National Association of Independent Insurers (NAII) submit this *amicus curiae* brief in support of the petition for writ of certiorari filed by Advocat, Inc., Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Diversicare Management Services Company (collectively, petitioners).[2] Petitioners seek review of the Arkansas Supreme Court's decision in *Advocat, Inc. v. Sauer*, No. 02-189, 2003 WL 1996087 (May 1, 2003), imposing a $21 million punitive damages award and joint and several liability for that award. As set forth below, *amici* have a profound interest in the punitive damages issues petitioners ask the Court to address.

AHCA is a private, non-profit federation of 51 affiliated state associations representing approximately 12,000 non-profit and proprietary providers of long-term care and more than 1.5 million caregivers. AHCA's representation encompasses about two-thirds of the country's nearly 17,000 nursing homes. AHCA and its members are committed to delivering quality care to our nation's elderly and disabled, and endorse Congress's efforts in the last decade to focus attention on the aging of our population and the increasing need for long-term care.

Since 1987, when Congress enacted the landmark nursing home reforms of the Omnibus Budget Reconciliation

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[2] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no party or their counsel authored, or paid for, this brief in whole or in part.

Act of 1987, P.L. 100-203, nursing homes participating in Medicare and Medicaid programs must meet numerous federal standards governing long-term care, including a requirement that they furnish a level of care that ensures the "highest practicable" state of well-being of each resident. 42 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. Part 483. The vast majority of nursing homes participate in the Medicare and Medicaid programs – indeed these programs cover 80 to 90 percent of our nursing home population – and are therefore subject to these requirements.

Additionally, in 2002, the Department of Health and Human Services (HHS) and Centers for Medicare & Medicaid Services launched the Nursing Home Quality Initiative to identify areas of care that may need improvement, to publicly report quality assessments to assist consumers in making nursing home choices, and to improve patient care outcomes. Preliminary reports indicate the initiative has had a positive influence on the quality of care. The same year, AHCA joined with AAHSA and the Alliance for Quality Nursing Home Care to establish a profession-wide program to support and advance the HHS initiative and to promote continuous quality assurance, resident and family rights, community involvement and financial stewardship.

However, providing quality care depends on a number of factors: clinical expertise, sound facilities, and the teamwork and dedication of a variety of health care professionals and nursing home staff. It also requires financial resources. AHCA has been, and continues to be, a relentless advocate of public policies that promote the funding necessary to deliver quality care.

AAHSA is also a non-profit membership association, with 40 affiliated state associations that represent over 5,600 non-profit facilities and organizations providing housing, health care and other services to more than 1 million aging and disabled individuals. Seventy percent of AAHSA homes and organizations have religious sponsors, including Catholic, Protestant, Jewish and Muslim denominations. Private foundations, fraternal organizations, government agencies, unions and community groups sponsor the other organizations. Many AAHSA members provide nursing home services and community-based services such as home health care, hospice care for those in the last stages of terminal illness, and specialty care for those with Alzheimer's disease and other forms of dementia. Other members are continuing-care retirement communities which provide "continuum of care" health care and housing on one site for the remainder of the residents' lives; residents maintain independence in their own homes for as long as possible through home-based services, but receive skilled nursing home care if needed.

AHCA and AAHSA members, thus, have a profound interest in the punitive damages issues presented by this case. Cases involving the care of our elderly are among the most sensitive in the courts, and during the last decade there has been a dramatic increase in such litigation. During the same period of time, the nursing home profession has also become among the most financially imperiled in the country. Medicare and Medicaid payments are modest, and in most cases do not cover the daily cost of care. Insurance costs have skyrocketed, driven by litigation costs and runaway verdicts like the $78 million jury verdict in this case ($15.025 million in compensatory damages and $63 million in punitive damages). Some

insurers have abandoned the market entirely. Thus, the profit margin of even proprietary providers is razor thin, and bankruptcies have become a problem in this health care sector which provides essential, long-term care to increasing numbers of our aged and infirm.

For non-profit providers, like AAHSA's members, excessive punitive damages awards pose additional, unique risks. Continuing care communities, for example, often hold substantial residential assets, largely financed by the residents, themselves, in addition to nursing home facilities and operations. Thus, an excessive punitive damages award can seriously impact, or even eliminate, an entire residential community. In addition, non-profits are often organized with their endowments held in separate foundations, making the specter of joint and several liability for punitive damages, regardless of actual culpability, a serious concern. Finally, non-profit organizations often hold and use substantial funds for other charitable purposes, which are imperiled by excessive punitive damages awards.

NAII is a non-profit property and casualty trade association, representing more than 725 member companies. As a group, NAII members write every line of insurance for a combined total of $124 billion in annual premiums, representing 31.2 percent of the industry's total premium volume. Members range in size from billion-dollar companies, to multi-line regional groups, to single-state and niche writers. One of NAII's primary purposes is to provide objective cost and loss data to regulators, legislators and state and federal agencies. NAII members also have a vital interest in the costs and consequences of excessive punitive damages awards.

This case graphically illustrates why the Court should now consider the issues petitioners present regarding the need for net worth evidence in determining whether a punitive damages award is excessive and in violation of the Due Process Clause of the Fourteenth Amendment – issues not addressed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). The Arkansas courts refused to consider petitioners' net worth evidence. Yet, that evidence established one petitioner had a $3.8 million *negative* net worth, another had a consolidated net worth of only $269,679 and the third had a net worth of $4.2 million. Thus, even the remitted $26 million award ($5 million compensatory damages, $21 million punitive damages) is grossly excessive. The $21 million punitive damages award, alone, is nearly five times the net worth of the one petitioner with any net worth to speak of. While a punitive damages award can properly punish a defendant, an award that strikes a mortal economic blow, as the remitted award does in this case, falls outside constitutional bounds.

Not only did the Arkansas Supreme Court impose this staggering punitive damages sanction without regard for petitioners' net worth, it went on to justify the result under the kind of company-wide rationale this Court condemned in *Campbell*. The state court seemingly took comfort in the remitted $21 million punitive damages number because one petitioner operates some 86 facilities in the southeastern United States and Canada and, according to the state court, oversees "a major business enterprise." *Advocat, Inc.*, No. 02-189, at 19. But business size is not any kind of measure of net worth, as the proffered evidence of petitioners' net worth confirms.

Furthermore, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Campbell*, 123 S. Ct. at 1523.

On top of all this, the Arkansas Supreme Court *sua sponte* imposed joint and several liability for the remitted $21 million punitive damages award. Not only did this appellate "fact finding" transgress each petitioner's due process rights to notice and an opportunity to be heard (in the trial court, the punitive damages claims were tried separately as to each defendant), but as *Gore* and *Campbell* indicate, due process requires an *individualized* assessment of a defendant's own particular conduct.

Amici fully appreciate there is a jury finding of liability for punitive damages in this case, and they are not before the Court urging that this finding be revisited. The crippling amount of the penalty imposed, however, presents questions of compelling nationwide concern, which the Court should address to complete the task it has undertaken in *Gore* and *Campbell*.

SUMMARY OF ARGUMENT

Excessive punitive damages awards, like the one in this case, have had a catastrophic impact on *all* nursing homes, including those with impeccable records. Nursing homes face unprecedented fiscal challenges simply to provide quality care. Both the demand for and cost to provide skilled nursing home services have increased

significantly. Yet, payments under Medicare and Medicaid, the two programs that provide most of the funding for these services, have remained exceedingly modest, often not covering the cost of daily care.

The additional burden of soaring insurance costs – driven largely by increased litigation costs and astronomical verdicts like the $78 million verdict returned by the jury here – has brought the nursing home profession to a state of financial crisis. Hundreds of providers have either gone bankrupt or simply given up and gone out of business. Those remaining have the barest of profit margins or operate only by the grace of charitable subsidies. In short, every dollar paid out in an excessive punitive damages award, or because of increased operating costs attributable to such awards, is a dollar nursing homes can ill afford to divert from patient care.

Thus, this case presents a compelling context in which to address the punitive damages issues raised by petitioners.

ARGUMENT

A. Nursing Homes Provide Vital Long-Term Care For A Growing Number Of Individuals In Our Society

Nursing homes provide care for nearly 2 million individuals on any given day and more than 3.5 million people over the course of a year. Centers for Medicare & Medicaid Services, *Health Care Industry Market Update: Nursing Facilities* 5 [hereinafter CMS], *at* http://www.cms.hhs.gov/reports/hcimu/hcimu_05202003.pdf (May 20, 2003). While these numbers are large, they are expected to

grow even more dramatically in the coming decades as "baby-boomers" enter their senior years.

Census data indicates that by 2020, the number of individuals over age 85 will increase by nearly 60 percent, and by 2040, by more than 200 percent. Cherie Song, *States Move to Curb Nursing Home Suits: Damages, Right to Sue are Limited*, Nat'l L.J., July 7, 2003, at 1, *available at* LEXIS, News Library, Ntlawj File; *see also Projections of the Total Resident Population by 5-year Age Groups, and Sex with Special Age Categories: Middle Series, 2001 to 2005*, at 3, *at* http://www.census.gov/population/projections/nation/summary/np-t3-b.txt (last visited Aug. 15, 2003) (in 2003, 4.684 million individuals 85 years and over); *Projections of the Total Resident Population by 5-year Age Groups, and Sex with Special Age Categories: Middle Series, 2025 to 2045*, at 2 & 4, *at* http://www.census.gov/population/projections/nation/summary/np-t3-f.txt (last visited Aug. 15, 2003) (in 2030, 8.931 million individuals 85 years and over, and in 2040, 14.284 million).

A commensurate increase is expected in the number of individuals needing nursing home care, with current estimates indicating approximately 5 million individuals will need long-term care by 2030. Population Resource Center, *The Demographics of Aging in America*, *at* http://www.prcdc.org/summaries/aging.html (last visited Aug. 14, 2003).

B. Nursing Homes Face Unprecedented Fiscal Challenges

1. The Vast Majority Of Nursing Home Care Is Paid For By Medicare Or Medicaid

Nursing homes operate on the slimmest of margins that continue to shrink. From the first quarter of 2002 to

the first quarter of 2003, the average profit margin of publicly traded for-profit nursing homes declined from 2.8 percent to 1.1 percent. CMS at 3. By any measure, this is a razor thin margin and one that can scarcely sustain economic vitality in this important sector of our health care industry.

Non-profit nursing homes have fared even worse, due to historically slimmer margins coupled with recent declines in charitable contributions and endowment income. CMS at 3, 11, 22. In New York, for example, nearly half of all non-profit nursing homes lost money in 2001. Samantha Marshall, *Nursing Home Finances Sink Fast; Survey: Bankruptcy Danger Rising as Reimbursements Fall; Cutbacks Beginning*, Crain's N.Y. Bus., Jan. 6, 2003, *available at* LEXIS, News Library, Nybus File.

Frustratingly, nursing homes can do little to increase their income since it is largely fixed by the government through the Medicare and Medicaid programs. Medicare is a federally-funded program that covers 10 to 15 percent of nursing home residents.[3] CMS at 3, 24. Medicaid, a state-operated system, covers the vast majority of nursing home residents – 65 to 70 percent. *Id.*

In 2000, the average Medicaid payment was $115 per day – nearly 8 percent *less* than the amount necessary to cover the daily cost of a resident's care. CMS at 11. In fact, unreimbursed Medicaid nursing care costs for that year were estimated at more than $3.5 billion nationwide. *Id.* at 11. One faith-based nursing home in Wisconsin reported

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[3] Medicare covers the first 100 days of care for residents who are discharged from an acute care hospital after receiving inpatient care for at least three consecutive days. 42 U.S.C. §§ 1395d(a)(2)(A), 1395x(i).

losses of $37.41 per patient per day as a result of inadequate Medicaid reimbursement. Jennie Tunkieicz, *Crisis Looming as County Loses More Nursing Homes*, Milwaukee J. Sentinel, Nov. 30, 2002, *available at* LEXIS, News Library, Milinl File.

In the coming year, the shortfall in Medicaid payments is only expected to get worse as states facing budget deficits forego cost of living adjustments or, worse, reduce existing reimbursement amounts in an attempt to comply with balanced budget laws. CMS at 3, 4, 24. In fact, forecasters predict 37 states will freeze or reduce their Medicaid reimbursements for 2004. *Id.* at 24.

Nor can nursing homes equitably look to the tiny percentage of patients who pay for their own care to make up for stagnant or declining government reimbursements. In fact, this would simply accelerate the depletion of individual assets, speeding the private payor's entrance into and reliance on the Medicaid program. CMS at 23 (many private-pay residents eventually spend down their assets and become Medicaid eligible).

To put all this in graphic perspective here, at the current average Medicaid reimbursement rate, every $1 million in punitive damages awarded against a nursing home equates to more than 8500 bed-days or more than 23 years of Medicaid reimbursement. Thus, the impact of an excessive punitive damages award on a nursing home is likely to be catastrophic.

2. Individuals Entering Nursing Homes Are Sicker And More Infirm Than In The Past, Requiring Greater Care

At the same time nursing home income and profitability have been constrained, the nursing home population

overall has become more infirm, requiring more care. Today, 95 percent of residents need assistance bathing, 55 percent are bladder incontinent, 46 percent are bowel incontinent and 50 percent need assistance eating. OSCAR Data Reports: Patient Characteristics, Activity of Daily Living – Bathing, *at* http://www.ahca.org/research/oscar/rpt_ADL%20Bathing_dec02.pdf (last visited Aug. 15, 2003); Activity of Daily Living – Bladder and Bowel Status, *at* http://www.ahca.org/research/oscar/rpt_MC_bladderbowel_dec02.pdf (last visited Aug. 15, 2003); Activity of Daily Living – Eating, *at* http://www.ahca.org/research/oscar/rpt_ADL%20Eating_dec02.pdf (last visited Aug. 15, 2003).[4]

This change in patient care needs is due in part to longer life spans. *See* CNN.com, *CDC: Americans Living Longer Than Ever*, *at* http://www.cnn.com/2003/HEALTH/03/14/life.expectancy.ap/ (Mar. 14, 2003). The Medicare inpatient hospital prospective payment system also plays a role by encouraging early release of patients from acute care facilities to nursing homes. Thus, nursing homes now receive patients who, in prior years, would have remained at acute care facilities. William J. Warfel, *Nursing Home Litigation – A Case for Reform*, 54 Chartered Prop. & Casualty Ins. J. 233 (Winter 2001), *available at* 2001 WL 19559567 (see section entitled, "Financing Environment for Long-Term Care"); CMS at 7. Assisted living and other care alternatives have also increased in number, providing care for healthier seniors who in the past might have received care in a nursing home. Samantha Marshall,

[4] The Online Survey, Certification and Reporting (OSCAR) data network maintained by the Centers for Medicare and Medicaid Services in cooperation with state long-term care surveying agencies is the most comprehensive source of facility level information on the operations, patient census and regulatory compliance of nursing facilities.

Nursing Home Finances Sink Fast; Survey: Bankruptcy Danger Rising as Reimbursements Fall; Cutbacks Beginning, Crain's N.Y. Bus., Jan. 6, 2003, *available at* LEXIS, News Library, Nybus File.

Accordingly, the need for skilled nursing home staff is more acute than ever. It also comes at a time when there is a chronic shortage of registered nurses and certified nursing assistants. As a result, nursing homes face stiff competition for caregivers. *See generally* Paraprofessional Healthcare Institute, *Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions*, *at* http://www.paraprofessional.org/publications/CLTC_doc_rev1.pdf (Jan. 2003); National Center for Health Workforce Analysis, U.S. Dep't of Health & Human Serv., *Projected Supply, Demand and Shortages of Registered Nurses: 2000-2020*, *at* http://www.ahca.org/research/rnsupply_demand.pdf (July 2002). In addition, the personal characteristics necessary to work effectively in this health care sector – a special compassion and caring for the elderly and disabled – make hiring and retention of staff a particular challenge.

The nursing home profession, thus, faces unprecedented challenges in delivering quality care, making the problem of excessive punitive damages awards a matter of paramount concern.

C. Excessive Punitive Damages Awards Are Crippling Nursing Homes And Diverting Scarce Dollars Away From Patient Care

1. There Has Been A Dramatic Increase In Nursing Home Litigation, Including Excessive Punitive Damages Awards

Since the early 1990's, there has been a steady increase in nursing home litigation. David G. Stevenson &

David M. Studdert, *The Rise of Nursing Home Litigation: Findings From a National Survey of Attorneys*, 22 Health Affairs 219 (March/April 2003) [hereinafter Stevenson & Studdert], *available at* LEXIS, Genmed Library, Hltaff File. The number of lawsuits per 1,000 beds has *tripled* over the past ten years. CMS at 4, 12. Today, nursing home litigation is one of the fastest-growing areas of health care litigation. Stevenson & Studdert at 219. In the first nine months of 2001, alone, or example, 62 percent of the nursing homes in Florida were sued. Stephen Nohlgren, *Nursing Homes on Brink of Crisis*, St. Petersburg Times (Florida), Dec. 21, 2001, at 1B, *available at* LEXIS, News Library, Stpete File.

Nor is the growth in nursing home litigation limited to the sheer number of cases; the size of damages awards has also increased dramatically. In the past decade, awards have tripled in size and now generally exceed twice the amount awarded in a typical medical malpractice claim. CMS at 4, 12; Aon Risk Consultants, *Long Term Care: General Liability and Professional Liability – Actuarial Analysis*, at 3 [hereinafter Aon], *at* http://www.ahca.org/brief/aon_ltcanalysis2003.pdf (Mar. 3, 2003); Stevenson & Studdert at 223.

Punitive damages awards, in particular, have become staggering. *E.g.,* Claims Mgmt. Div. Of XL Reinsurance Am., *Florida Passes Reforms on Nursing Home Liability*, 3 Nursing Home Lit. Rptr. 14 (Aug. 24, 2001), *available at* LEXIS, News Library, Curnws File (reporting $17 million punitive damages award by Florida jury); *Facility, Aide Hit with $9.25 Million Verdict*, Nat'l L.J., Apr. 1, 2002, at B2, *available at* LEXIS, News Library, Ntlawj File (reporting $8.25 million punitive damages award by Texas jury); Philippa Maister, *Soaring Insurance Premiums Crippling*

Area Nursing Homes, Atlanta Bus. Chron., *at* http://atlanta.bizjournals.com/atlanta/stories/2001/04/30/focus7.html (April 30, 2001) (reporting $3.3 million punitive damages award by Georgia jury); *see also* Dave Parks, *Nursing Home to Appeal $7 Million Judgment*, The Birmingham News, Dec. 19, 2001, *available at* LEXIS, News Library, Curnws File (reporting $7 million verdict by Alabama jury).

In fact, *The National Law Journal*'s list of top 100 verdicts nationwide for 2001 and 2002 included two Texas nursing home cases: one in which the jury assessed $310 million in punitive damages, and another in which the verdict against the nursing home totaled $82 million. Cherie Song, *States Move to Curb Nursing Home Suits: Damages, Right to Sue are Limited*, Nat'l L.J., July 7, 2003, at 1, *available at* LEXIS, News Library, Ntlawj File; *see Fuqua v. Horizon/CMS Healthcare Corp.*, No. 4:98-00-CV-1087-Y, 2001 WL 267650 (N.D. Tex. Feb. 14, 2001).

While *amici* appreciate that punitive damages are an important tool in our civil law, there are – and must be – reasoned limits to the toll a jury can exact. In this sector of our health care system punitive damages awards are, quite frankly, out of control.

2. Spiraling Litigation Costs And Excessive Verdicts Have Substantially Contributed To The Current Cost-And-Availability Crisis In Liability Insurance For All Nursing Homes

The tide of litigation against nursing homes, and particularly excessive punitive damages awards, has burdened the entire profession with skyrocketing insurance costs for which there are simply no resources to pay.

In a majority of states, some types of punitive damages are insurable, so excessive punitive damages awards directly affect insurance reserves. *See generally* Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 Bus. Law. 283, 285 (1999).

Even in the absence of a claim against an insured, the surge in nursing home litigation and reported verdicts have prompted insurers to raise premiums to protect against unknown and unpredictable future losses. CMS at 13; William J. Warfel, *Nursing Home Litigation – A Case for Reform*, 54 Chartered Prop. & Casualty Ins. J. 233 (Winter 2001), *available at* 2001 WL 19559567 (see section entitled, "Nursing Home Liability Insurance Crisis," stating that escalating loss costs have caused escalating insurance prices). Indeed, the mere potential of phenomenal punitive damages awards has fueled litigation, further driving up litigation costs and the cost of insurance. *Id.* (see section entitled, "Conclusion," stating that awards create a lottery atmosphere among potential plaintiffs).

Thus, excessive punitive damages awards have contributed to the increase in insurance costs for *all* nursing homes, both for profit and non-profit, and regardless of their good records and their quality care. Claims Mgmt. Div. Of XL Reinsurance Am., *Florida Passes Reforms on Nursing Home Liability*, 3 Nursing Home Lit. Rptr. 14 (Aug. 24, 2001), *available at* LEXIS, News Library, Curnws File; Kendall Anderson, *Insurance Premiums Blamed for Nursing Home Closure*, Dallas Morning News, Aug. 12, 2002, *available at* LEXIS, News Library, Dalnws File (non-profit nursing home faced fivefold increase in annual premium despite no major lawsuits or settlements); Diane Levick, *New Liability Headaches for Caregivers: State Nursing Homes Face Steep Increases for*

Insurance, The Hartford Courant (Conn.), Aug. 31, 2001, at A1, *available at* 2001 WL 25324122 (rates are skyrocketing for homes without claims).

The impact of excessive verdicts on insurance costs even crosses state lines. Kristina Stefanova, *Suits Boost Nursing Homes' Premiums*, Wash. Times, Sept. 4, 2001, at B6, *available at* 2001 WL 4161132 (even though few lawsuits in Virginia and Maryland, rates have risen dramatically because insurers spread costs to all insureds regardless of location); Terrance J. Shanahan, *Statutory Limits on Punitive Damages in Nursing Home Negligence Tort Actions: Preventing the Collapse of the Private Nursing Home*, 4 J. Health Care L. & Pol'y 373, 384 (2001), *available at* LEXIS, Lawrev Library, Jhclp File ("Given the comparative paucity of nursing home liability insurers, it appears that the runaway damage awards in some states . . . are raising the costs for nursing homes nationwide. . . ."); Dale Wetzel, *North Dakota: Nursing Homes Struggle with Rising Costs; Southern Troubles Raise Rates*, Grand Fork Herald (N.D.), Sep. 30, 2002, *available at* 2002 WL 22566438 (although few lawsuits in North Dakota, nursing homes face sharply higher insurance rates); Diane Levick, *New Liability Headaches for Caregivers: State Nursing Homes Face Steep Increases for Insurance*, The Hartford Courant (Conn.), Aug. 31, 2001, at A1, *available at* 2001 WL 25324122 (rates doubling and tripling in Connecticut even though the state has a more restrained legal climate than other states).

Accordingly, nearly unimaginable rate increases in nursing home insurance have been reported across the country. A group of North Carolina and Virginia nursing homes reported a 434 percent premium increase in one year, followed by an 85 percent increase the next. Marc

Barnes, *Insurance Hikes Threaten Nursing Homes, at* http://www.bizjournals.com/triad/stories/2002/02/18/story1.html (Feb. 18, 2002). In Florida, the per-bed price of liability insurance jumped from $111 in 2000 to $1504 in 2001, with a then-anticipated increase to $2050 in 2002. Jim Saunders, *Nursing Home Insurers Cautious; Facilities Face Jan. 1 Deadline for Liability*, The Florida Times-Union, Dec. 17, 2001, at B1, *available at* LEXIS, News Library, Flatun File.

Indeed, the national average for insurance costs increased from $240 per occupied bed in 1995 to $2360 in 2001 – a ten-fold increase – and nursing homes often receive reduced coverage even at these higher rates.[5] Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Affairs, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 13, *at* http://aspe.hhs.gov/daltcp/reports/litrefm.pdf (July 24, 2002); Aon at 4.

Moreover, finding coverage – at any price – has become difficult. Given the tidal wave of litigation and spate of excessive awards, one insurer after another has pulled out of the market altogether. Leslie Werstein Hann, *Driven Out*, 100 Best's Review 84 (Mar. 1, 2000), *available at* 2000 WL 22630136; CMS at 13 (in Texas, between 1996 and 2002, insurance providers dropped from 8 to 2; in Florida, there are no state-licensed providers).

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[5] Thus, the impact on insurance has been two-fold: substantially increased rates to maintain coverage or more modest rate increases but reduced coverage.

The result is "[a] price/availability problem with respect to nursing home liability insurance" of "crisis proportions in many states in the U.S." William J. Warfel, *Nursing Home Litigation – A Case for Reform*, 54 Chartered Prop. & Casualty Ins. J. 233 (Winter 2001), *available at* 2001 WL 19559567; *cf.* CMS at 13.

3. The Consequences For The Entire Nursing Home Profession Have Been Catastrophic

Combined with the constraints on income and increased costs of caring for a more infirm nursing home population, the staggering increase in insurance costs and exposure to excessive punitive damages awards has pushed the nursing home profession to the financial brink.

Many nursing homes have been forced into bankruptcy. CMS at 13. Since the beginning of this year, alone, three multi-facility providers have filed for bankruptcy, including the twelfth largest provider, which had operated nearly 100 skilled nursing facilities in 19 states. *Id.* at 20, 21; Centennial Healthcare website, *at* http://www.centennialhc.com/facilities.htm (last visited Aug. 12, 2003). These bankruptcies come on the heels of the 1999 to 2000 period during which 1,651 nursing homes sought bankruptcy protection (Leslie Werstein Hann, *Driven Out*, 100 Best's Review 84 (Mar. 1, 2000), *available at* 2000 WL 22630136), and five of the top eight nursing home companies filed for protection from creditors (CMS at 20, 21). Two of these top eight companies recently emerged from bankruptcy, but continue to struggle to stay solvent. *Id.* at 20

Other nursing homes have simply closed, concluding the business is no longer sustainable. In Florida, for example, spiraling insurance costs prompted one home to close, even

though it ranked 51st out of 668 homes in the state in terms of quality. Reuters Health, *Legal Liability Costs Surge for US Nursing Homes*, *at* http://yourhealth.stlukesonline.org/healthnews/reuters/newsstory0314200336.htm (Mar. 14, 2003). Similar concerns motivated the closure of faith-based, non-profit long-term care centers across the state of Texas. Kendall Anderson, *Insurance Premiums Blamed for Nursing Home Closure*, Dallas Morning News, Aug. 12, 2002, *available at* LEXIS, News Library, Dalnws File.

As one lawmaker observed, nursing homes are being "'sued out of existence.'" Cherie Song, *States Move to Curb Nursing Home Suits: Damages, Right to Sue are Limited*, Nat'l L.J., July 7, 2003, at 1, *available at* LEXIS, News Library, Ntlawj File.

The instant case is one more example. Even the remitted $21 million punitive damages award is more than any of the petitioners can begin to pay. It is nearly five times the net worth of the only petitioner with any significant net worth. And petitioners were handed this economic death sentence with no consideration at all of their net worth, individually or collectively. This transgresses both the purpose and constitutional bounds of punitive damages – to punish, not destroy.

Furthermore, the Arkansas Supreme Court seems to have justified its $21 million stultifying sanction as an indictment of petitioners' multi-state business. Not only is there no evidence discussed by the Arkansas court in its decision that could support a sweeping condemnation of petitioners' other facilities, but this is exactly the far-flung, "industry-wide" indictment the Court condemned in *Campbell*. 123 S. Ct. at 1521-23. Finally, the Arkansas appellate court found petitioners "jointly and severally"

liable for the $21 million remitted punitive damages award – even though no such case was ever put on or tried in the trial court and even though punishment must be meted out on an individualized basis under *Gore* and *Campbell*.

CONCLUSION

The Court has not yet spoken on net worth as a necessary consideration in drawing the line between fair and reasoned punishment, which is constitutionally permissible, and arbitrary economic forfeiture, which is prohibited by the Due Process Clause of the Fourteenth Amendment. This case presents a compelling context in which to do so, and *amici* urge the Court to grant the petition for certiorari and resolve these pressing punitive damages questions of national significance.

DATED: August 28, 2003.

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